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No. .....

Supreme Court, U.S.
FILED
APR 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

HENRY T. PRICE,

Petitioner,

v

TAMPA ELECTRIC COMPANY,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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44 pp

QUESTIONS PRESENTED

I. Whether an employer can avoid paying overtime for home study courses when the courses are directly related to an employee's job and he will suffer a change in working conditions for failing to complete them?

II. Whether summary judgment on a claim for overtime compensation is justified when an employee states under oath that he involuntarily completed home study courses directly related to his work?

PARTIES TO THE PROCEEDINGS

The parties in this case are named in the caption.

TABLE OF CONTENTS

	Page No.
Questions Presented	i
Parties to the Proceedings	i
Table of Authorities	iii
Opinion Below	1
Jurisdictional Statement	1
Constitutional, Statutory and Regulatory Provisions Involved	1
Statement of the Case	4
Reasons for Granting the Writ	7
I. PERMITTING EMPLOYERS TO AVOID PAYMENT OF OVERTIME TO AN EMPLOYEE FOR HOME STUDY COURSES DIRECTLY RELATED TO HIS JOB ON AN INVOLUNTARY BASIS HAS A FAR-REACHING EFFECT ON THE FAIR LABOR STANDARDS ACT	7
II. THIS COURT'S SUPERVISORY RESPONSIBILITIES SHOULD NOT PERMIT SUMMARY JUDGMENT TO BE ENTERED IN THE FACE OF DISPUTED FACTUAL QUESTIONS	9
Conclusion	10

TABLE OF AUTHORITIES

Page No.

CONSTITUTION

United States Constitution, Amendment VII 1

CASES

Fountain v. Filson, 336 U.S. 681 (1949) 9

Rossell v. Resor, 435 F.2d 865 (2nd Cir. 1970) 10

Williams v. Taylor, 677 F.2d 510 (5th Cir. 1982) 9

RULES

Federal Rule of Civil Procedure 56 ..... 9, 10

STATUTES

29 U.S.C. § 207(a) 1, 7

29 U.S.C. § 216(b) 6

REGULATIONS

§ 785.27 ..... 2, 8

§ 785.28 ..... 3, 8

§ 785.29 ..... 3, 8, 9

§ 785.31 ..... 4, 8, 9

OPINION BELOW

The decision of the court below is reported as *Price v. Tampa Electric Co.*, 806 F.2d 1551 (11th Cir. 1987). (A1).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the decision of the Court of Appeals on petition for certiorari under 28 U.S.C. § 1254(1). The court below decided this case on January 5, 1987.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

U. S. Const. Amend. VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, then according to the rules of the common law.

29 U.S.C. § 207

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise en-

gaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966 —

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 C.F.R. § 785.27

Attendance at lectures, meetings, training programs and similar activities need not be counted as working time if the following four criteria are met:

(a) Attendance is outside of the employee's regular working hours;

(b) Attendance is in fact voluntary;

(c) The course, lecture, or meeting is not directly related to the employee's job; and

(d) The employee does not perform any productive work during such attendance.

29 C.F.R. § 785.28

Attendance is not voluntary, of course, if it is required by the employer. It is not voluntary in fact if the employee is given to understand or led to believe that his present working conditions or the continuance of his employment would be adversely affected by nonattendance.

29 C.F.R. § 785.29

The training is directly related to the employee's job if it is designed to make the employee handle his job more effectively as distinguished from training him for another job, or to a new or additional skill. For example, a stenographer who is given a course in stenography is engaged in an activity to make her a better stenographer. Time spent in such a course given by the employer or under his auspices is hours worked. However, if the stenographer takes a course in bookkeeping, it may not be directly related to her job. Thus, the time she spends voluntarily in taking such a bookkeeping course, outside of regular working hours, need not be counted as working time. Where a training course is instituted for the bona fide purpose of preparing for advancement through upgrading the employee to a higher skill, and is not intended to make the

employee more efficient in his present job, the training is not considered directly related to the employee's job even though the course incidentally improves his skill in doing his regular work.

29 C.F.R. § 785.31

There are some special situations where the time spent in attending lectures, training sessions and courses of instruction is not regarded as hours worked. For example, an employer may establish for the benefit of his employee a program of instruction which corresponds to courses offered by independent bona fide institutions of learning. Voluntary attendance by an employee at such courses outside of working hours would not be hours worked even if they are directly related to his job, or paid for by the employer.

STATEMENT OF THE CASE

Petitioner had been a meterman in Respondent's meter department for 34 years when Respondent and Petitioner's union negotiated a collective bargaining agreement in 1981. (A24). The agreement divided the existing meterman position into three categories: meter mechanics "A," "B" and meterman. (A22). Meter mechanics "A" and "B" were expected to work on state-of the-art solid state equipment while employees in the meterman category created by the agreement were expected to work on traditional electro-mechanical meters. (A24).

The agreement required meter mechanics "A" or "B" to complete courses of study in solid state equip-

ment and to demonstrate their proficiency. The agreement was silent on whether the employees were to complete their courses on their time, company time or a combination of both. (A22).

Before the agreement was ratified, Petitioner volunteered to take two home study courses. He also elected to become a meter mechanic "B" and was placed in that category by Respondent. Before the agreement was ratified, the election to become a meter mechanic "B" had no relationship to the courses. (A17, 20).

After the agreement was ratified, Resepondent announced that Petitioner and others who had elected to become meter mechanics "B" would be required to complete the courses on their own time. (A19-20). Plaintiff finished the second course and completed the third and fourth courses outside working hours after Respondent's announcement. He worked as a meter mechanic "B" while completing the courses. (A20).

Petitioner had worked on Respondent's solid state equipment for years. He held a variety of positions within the meter department and had spent most of his time as of 1981 testing rubber insulation equipment. He was always expected to perform other meterman tasks and did so occasionally. For four months before taking the courses Petitioner replaced another employee and worked extensively on solid state equipment. Petitioner elected to become a meter mechanic "B" and to take the courses to maintain the position he held before the agreement was ratified. He never agreed to complete the courses on his own time. (A18-19).

After fruitless efforts to have his union and the department of labor redress his overtime grievance, Petitioner filed suit in a state court. The case was removed to the United States District Court for the Middle District of Florida. Jurisdiction of both courts was invoked under § 16(b) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b). (A12-16).

Petitioner alleged that his home study courses were related to his work and were completed by him involuntarily as his failure to do so outside working hours would have resulted in a demotion to the meterman classification created by the agreement. Other employees who had elected to become meter mechanics "B" were demoted to the meterman classification created by the agreement when they failed to complete the courses. (A18-20).

Respondent answered and moved for summary judgment. The District Court accepted Respondent's position and found that Petitioner's failure to complete the courses would not have resulted in a demotion since he would have remained a meterman in any event. In addition, the District Court found that Petitioner took the courses voluntarily to "progress" to the meter mechanic "B" position. The trial court rejected Petitioner's sworn statement that, since he had performed the same duties as a meterman before the agreement and as a meter mechanic "B" afterward, the courses did not permit him to "progress" and he was not promoted. (A6). Instead, Petitioner argued, he devoted some 2,000 hours to home studies to retain the position he always occupied. (A15, 20). The Court of Appeals for the Eleventh Circuit affirmed on the same basis and suggested that the home

study courses only incidentally benefitted Petitioner's work. (A3-4).

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REASONS FOR GRANTING THE WRIT

I. PERMITTING EMPLOYERS TO AVOID PAYMENT OF OVERTIME TO AN EMPLOYEE FOR HOME STUDY COURSES DIRECTLY RELATED TO HIS JOB ON AN INVOLUNTARY BASIS HAS A FAR-REACHING EFFECT ON THE FAIR LABOR STANDARDS ACT.

The decisions of the courts below have the effect of permitting an employer to meet technological changes by requiring employees to complete home study courses on the employee's own time. If permitted, literally millions of skilled employees will be forced to keep abreast of advancing technology without requiring employers to pay the overtime compensation required by the Fair Labor Standards Act, 29 U.S.C. § 207(a). The impact of this interpretation of the Act justifies this Court's review.

Essentially, Petitioner alleged below that his duties remained unchanged when he accepted the meter mechanic "B" position. (A18, 20). As a meter mechanic "B" and as a meterman before the agreement was reached, he worked on solid state equipment. Under the agreement, meter mechanics "A" and "B" were expected to work on the more sophisticated equipment while metermen worked on the less sophisticated electro-mechanical equipment. (A24-25). Respondent returned other meter mechanics "B" to the meterman ranks when they failed to complete the courses. (A20, 26-27).

Thus, Petitioner justifiably argued below that his completing the courses was not "voluntary" within the meaning of the regulations implemented by the Department of Labor, 29 C.F.R. § 785.28 (1981). His failure to complete the courses would have resulted in lower pay. (A22). It also would have had an adverse impact on his working conditions since he would have worked on the less sophisticated equipment if demoted to meterman. (A24-25).

In addition, Petitioner alleged below that the courses were directly related to his work as they improved his ability to repair and test solid state equipment. (A20). Since the courses were not voluntary and were directly related to his work, they should have been counted as working time under the criteria of 29 C.F.R. 785.27 (1981).

Both courts below, however, essentially found that a meterman is a meterman regardless of his actual duties. They entirely disregarded the differences in functions of a meterman before and after the agreement was reached. (A3, 6). If this decision is permitted to stand any employer can require home studies and avoid the overtime requirements of the Fair Labor Standards Act by simply changing the designation of an employee.

The court of appeals also found that, under 29 C.F.R. § 785.31, courses designed to prepare an employee for advancement by upgrading his skills are not considered directly related to an employee's job. (A3). Actually, the court of appeals was referring to § 785.29. Under either section, the courses must not be intended to make the employee more efficient in his present job although they may incidentally improve the employee's skills at his job. The court of appeals, however, overlooked the provisions

of § 785.29 and § 785.31 that such course participation must be voluntary. It also ignored Petitioner's sworn statement that the courses improved his work performance. (A20).

Therefore, the far-reaching implications of the decisions below justify this Court's review.

II. THIS COURT'S SUPERVISORY RESPONSIBILITIES SHOULD NOT PERMIT SUMMARY JUDGMENT TO BE ENTERED IN THE FACE OF DISPUTED FACTUAL QUESTIONS.

The courts below ignored Petitioner's sworn statement in granting and upholding summary judgment in favor of Respondent. Basically, Petitioner's affidavit in response to Respondent's motion alleged that the courses directly related to his work and that he faced a demotion in fact if he refused to complete them on his own time. Therefore, the courts below deprived Petitioner of his right to a trial by jury under the Seventh Amendment to the Constitution by finding the absence of a "genuine issue as to any material fact" under Fed.R.Civ.P. 56.

The decision of the court of appeals also conflicted with the decision of this Court in *Fountain v. Filson*, 336 U.S. 681, 683 (1949), which held that summary judgment is appropriate only in the absence of a dispute as to any material fact. It also conflicts with at least one decision of another court of appeals by finding that Petitioner could not recover under any discernible circumstance. *Williams v. Taylor*, 677 F.2d 510, 514 (5th Cir. 1982). The courts below should not be permitted to resolve sharply conflicting factual statements in one party's favor.

More specifically, the decision of the court of appeals conflicts with *Rossell v. Resor,* 435 F.2d 865 (2nd Cir. 1970), which held that the question of whether an employee performed the same work at different pay levels could not be resolved by summary judgment. Petitioner alleged that his duties remained the same as a meter mechanic "B" as they were when he was a meterman before the new categories were created. In both positions he worked on the solid state equipment. Thus, completing the home study courses merely enabled Petitioner to retain his position, not to "progress" as the courts below found. (A18, 20).

The foregoing conflicts and violation of Fed.R.Civ.P. 56 justify this Court's review.

CONCLUSION

This Court should review the decision of the court of appeals as it presents far-reaching implications for enforcement of the overtime provisions of the Fair Labor Standards Act regarding home study courses. Its decision also should be reviewed as part of this Court's supervisory responsibility over the interpretation of the summary judgment provision contained in Fed.R.Civ.P. 56.

Respectfully submitted,

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No. .....

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1986

HENRY T. PRICE,
Petitioner,

v.

TAMPA ELECTRIC COMPANY,
Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX

INDEX

Page No.

OPINION OF UNITED STATES COURT OF APPEALS FOR THE 11th CIRCUIT A1

ORDER OF UNITED STATES DISTRICT COURT A5

JUDGMENT OF COURT OF APPEALS A10

COMPLAINT A12

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT A17

CONTRACT PROVISION—METER DEPARTMENT A22

AFFIDAVIT OF JAMES PHILLIP ROWLAND A23

MEMORANDUM DATED APRIL 11, 1983 TO GARY PENNINGTON A26

MEMORANDUM DATED APRIL 11, 1983 TO ALL CONCERNED A27

Henry T. PRICE, Plaintiff-Appellant,

v.

TAMPA ELECTRIC COMPANY,
Defendant-Appellee.

No. 86-3189.

United States Court of Appeals,
Eleventh Circuit.

Jan. 5, 1987.

Employee brought action to recover overtime compensation under Fair Labor Standards Act for time spent studying electronics courses at home. The United States District Court for the Middle District of Florida, No. 84-1135-CIV-T-15, William J. Castagna, J., entered summary judgment in favor of employer, and employee appealed. The Court of Appeals held that employee was not entitled to compensation, as employer did not require that employee take courses to continue working in his present job.

Affirmed.

Labor Relations—1283

Employee was not entitled to compensation under Fair Labor Standards Act for time he spent studying electronics courses at home; courses were not related to employee's current job, and employer did not require that employee take courses to continue in his position, but merely set up system whereby employee could elect to take courses to advance to higher salary level. Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b).

Robert Fraser, Tampa, Fla., for plaintiff-appellant.

Holland & Knight, Karl J. Brandes, Tampa, Fla., Stanford G. Wilson, Elarbee, Thompson, & Trapnell, Charles K. Howard, Jr., Atlanta, Ga., for defendant-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before CLARK, EDMONDSON and KEITH*, Circuit Judges.

PER CURIAM:

Appellant, Henry Price, alleging that his employer, Tampa Electric Company (TECO), violated § 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), seeks overtime compensation for the time he spent studying four Heathkit Electronics courses at home. Appellant has been a meterman with TECO since 1946. The courses were designed to train metermen on the new solid-state equipment that TECO planned to introduce, and thus to enable the metermen to advance to the new meterman "A" or "B" classifications established by the collective bargaining agreement. The district court granted TECO's motion for summary judgment, and we affirm.

Under the regulations issued by the Department of Labor pertaining to hours worked, 29 C.F.R. § 785.1, *et seq.*, training programs need not be counted as working time if (1) attendance is voluntary; (2) the course is not directly related to the employee's job; (3) attendance is outside of regular working hours; and (4) the employee does not per-

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* Honorable Damon J. Keith, U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

form productive work during attendance. *See* 29 C.F.R. § 785.27. Attendance is not voluntary when the employer requires the course or leads the employee to believe that he will suffer adversely if he fails to take the course. 29 C.F.R. § 785.28. TECO did not require that metermen take the course to continue working in this position. Rather, the company and the union agreed to set-up a system whereby metermen could elect to be trained on the new equipment and, upon enrollment in the first course, advance to a higher salary level. Had appellant chosen not to initially enroll in, or continue taking the courses, he would have remained a meterman with the same responsibilities and benefits he had enjoyed previously. Thus, appellant's claim that his attendance was not voluntary—because he never agreed to take the courses on his own time and because failure to complete the courses would require him to return to the meterman classification—is without merit.

A course that is designed to prepare an employee for advancement by upgrading his skills, and not intended to make the employee more efficient in his present job, is not considered directly related to the employee's job although it may incidentally improve his skills in performing his regular work. 29 C.F.R. § 785.31. Appellant admits that his primary responsibility was testing rubber goods in the Meter Department, and the manager of the department estimated that he spent more than 90% of his time in this capacity. During the remaining 10%, appellant worked on metering equipment that TECO had been using for several years. This equipment included electro-mechanical magnetic tape recorders and electro-magnetic meter recording devices. Although appellant may have benefited incidentally from training on the new solid-state meters, the

courses were not related to his current job of testing primarily rubber goods and, on occasion, metering equipment. Whether attendance was outside of regular working hours, and whether the appellant performed productive work during attendance, are not disputed issues.

Appellant contends that he was already familiar with the operation of solid-state meters as a result of his work on advanced components of the traditional meters, but this claim seems inconsistent with his assertion that he spent more than 2,000 hours studying the courses at home. Yet, assuming that appellant already possessed all of the skills necessary to work on the new solid-state meters, he would not be entitled to overtime compensation for his study time. The appropriate relief would have been to seek a waiver of the course requirement, prior to enrollment and completion of the four courses.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

HENRY T. PRICE,

Plaintiff,

vs. Case No. 84-1135-Civ-T-15

TAMPA ELECTRIC COMPANY,

Defendant.

ORDER

(filed Mar. 13, 1986)

The Court has considered the defendant's motion for summary judgment and the plaintiff's response together with the exhibits, affidavits and depositions on file.

The plaintiff alleges that his employer, the Tampa Electric Company (TECO), violated the maximum hours provision of the Fair Labor Standards Act as set forth at 29 U.S.C. § 207(a) when it failed to compensate him for time he allegedly spent on home study courses that were designed to allow the plaintiff to upgrade his technical skills so that he could be certified to work with certain new technology at TECO. The plaintiff was for several years a meterman at TECO and his job required him to work with rubber safety goods and to work with mechanical metering equipment. The home study courses involved in this case were Heathkit electronics courses designed to teach the skills necessary to qualify an employee to work on the more advanced electronic metering equipment that gradually is phasing out mechanical meters. The plaintiff

contends that the courses in electronics and circuitry were related to his work and that his pursuit of such education was not voluntary but that he had to take and complete the courses or face demotion.

TECO contends that the plaintiff took the courses voluntarily, that such courses were not required and that course work was made available to those who wished to better themselves by gaining proficiency and certification with technology that required higher skills. TECO stresses, and a fair reading of all of the affidavits and depositions confirms, that no meterman faced demotion for failure to take the courses and that no meterman was going to lose his job if he did not become proficient with electronic circuitry. On the contrary, the meterman had nothing to lose but could gain by taking the courses. A meterman who did not take the courses would not progress to the higher paying classification.

Notwithstanding plaintiff's counsel's clear efforts to characterize plaintiff's own deposition testimony to the contrary, and the artful drafting of plaintiff's affidavit, the Court must conclude that there is no real dispute as to any *material* facts. The plaintiff admits that he asked for the opportunity to take the courses, that he took the courses so that he could progress to a higher paying classification and that TECO agreed to pay him, and others, at the higher job classification rate because he promised to complete the coursework necessary to make him competent for that classification. *See* plaintiff's deposition at 20, 42, 44.

At the risk of repetition, it is significant that the plaintiff was a meterman to start with and could have remained a meterman without the courses. The courses were

necessary if he wanted to progress to the meterman B classification. TECO agreed to pay him as a meterman B while he took the courses. Although the plaintiff argues that the coursework was necessary to his job and that if he did not complete the course he would have been demoted, that argument is disingenuous because the demotion he speaks of would only have placed him back in the meterman pay classification that he was in before he promised to complete the coursework. Such is not a "demotion" and cannot be used as a basis for arguing that plaintiff's choice to pursue the coursework and receive the higher class B pay was involuntary. To conclude otherwise in the context of this case would be to penalize an employer for offering employees an incentive for self-improvement.

Not only are the material facts not in dispute but the plaintiff's case is internally defective to a degree that makes questionable his good faith. For example, at paragraph four of his affidavit the plaintiff contends that he elected to take the courses rather than face demotion to meterman under the union contract. Plainly, the plaintiff was a meterman when he volunteered to take the courses months before the union contract was negotiated. Thereafter, when the union contract was signed the plaintiff had completed one course and was taking the second one when he promised to complete the courses in return for the class B pay while he completed the courses. The plaintiff contends that to do other than promise to complete the courses would have been tantamount to a demotion because he would have remained in the meterman classification while others of his group received B classification pay while completing the courses required for the higher B classifi-

cation. The plaintiff's logic is convoluted and convoluted logic does not create a dispute about material fact. To the extent that the plaintiff may be unhappy that the union negotiated a contract with a class B meterman classification and may be unhappy that such classification requires the completion of coursework and certification and carries a wage rate higher than the basic meterman classification, the plaintiff's dispute is about the collective bargaining agreement. Such is not a wage and hour problem under the Fair Labor Standards Act.

At page five of his affidavit the plaintiff states that he never agreed to take the courses on his own time. Yet according to his deposition the plaintiff did ask to take the courses, clearly knew that the courses were home study courses, did study at home at his own pace and had absolutely no reason to believe that TECO would compensate him for his study time. On the contrary, it is clear that plaintiff knew TECO had no intention of providing any overtime compensation for such voluntary home study.

The plaintiff would like to receive compensation for his home study and may even believe he legitimately is entitled to such payment but the record of this case reveals no reasonable basis for awarding such relief under the maximum hour provisions of the Fair Labor Standards Act.

Having considered the foregoing, it is

ORDERED:

1. That the defendant's motion for summary judgment is Granted.

2. The Clerk shall enter final judgment for the defendant, Tampa Electric Company, and against plaintiff,

Henry T. Price, Sr., on the complaint the plaintiff to take nothing.

DONE AND ORDERED at Tampa, Florida this 13th day of March, 1986.

/s/ William J. Castagna
United States District Judge

Copies to
Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-3189

D. C. Docket No. 84-1135

HENRY T. PRICE,

Plaintiff-Appellant,

versus

TAMPA ELECTRIC COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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Before CLARK, EDMONDSON and KEITH*, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

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* Honorable Damon J. Keith, U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

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*Honorable Damon J. Keith, U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

Entered: January 5, 1987

For the Court: Miguel J. Cortez, Clerk

By: /s/ David Maland
Deputy Clerk

ISSUED AS MANDATE: Jan 30 1987

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT IN AND FOR HILLSBOROUGH COUNTY, FLORIDA. CIVIL ACTION.

HENRY T. PRICE,	*	
Plaintiff,	*	CASE NO.
vs.	*	DIVISION
TAMPA ELECTRIC COMPANY,	*	
Defendant.	*	

COMPLAINT

Plaintiff Henry T. Price sues Defendant Tampa Electric Company and alleges:

COUNT I

1. This is an action under the provisions of § 16(b) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 216 (b), for the recovery of unpaid overtime compensation, liquidated damages, attorney's fees and costs.

2. Plaintiff is a resident of Hillsborough County, Florida.

3. Defendant is a corporation organized and existing under the laws of the State of Florida and is doing business in Hillsborough County, Florida.

4. This Court is vested with jurisdiction by virtue of 29 U.S.C. § 216(b).

5. For a period of three years preceding the filing of this complaint, Plaintiff was employed by Defendant

in Hillsborough County, Florida as a Meter Mechanic "B" and was paid an hourly wage. Plaintiff is an employee entitled to the overtime in accordance with 29 U.S.C. § 207.

6. At all times material to this Complaint, Defendant was an enterprise engaged in the business of producing electricity for use in interstate commerce. The connections between Defendant's business and interstate commerce include:

a) Importing millions of dollars worth of fuel, supplies and machinery from suppliers outside the State of Florida.

b) Furnishing electricity to individuals and corporations engaged in interstate commerce.

c) Furnishing electricity to a grid network consisting of Defendant and other power companies located within Florida and outside of Florida.

7. At all times material to this complaint, Plaintiff was engaged in interstate commerce as an employee of Defendant. Plaintiff's tasks as a Meter Mechanic "B" included:

a) Repairing, maintaining and servicing electrical meters manufactured outside of the State of Florida.

b) Repairing, maintaining and servicing meters to measure electrical consumption for customers engaged in interstate commerce.

8. During the period of three years preceding the filing of this Complaint, Defendant employed Plaintiff

while Plaintiff and Defendant were engaged in interstate commerce for many work weeks longer than 40 hours. During those weeks Defendant failed and refused to compensate Plaintiff for such work in excess of 40 hours at week at rates not less than one and one-half times the regular rate at which Plaintiff was employed. Defendant's failure and refusal to pay the overtime rate of one and one-half times the regular rate earned by Plaintiff violated the provisions of § 7(a) of the Fair Labor Standards Act, 29 U.S.C. § 207(a).

9. Plaintiff is entitled to overtime compensation for the period of three years preceding the filing of this complaint for hours spent in studies required by Defendant to meet the technological changes of Defendant's industry.

10. Plaintiff studied the courses selected by Defendant outside of his working time on an involuntary basis since his failure to take and complete the courses under Defendant's supervision, direction and control would have resulted in a demotion to the position of meterman.

11. Plaintiff's studies were directly related to his duties as a Meter Mechanic "B" and consisted of keeping abreast of technological changes in meters. As such, Plaintiff's studies were an integral and indispensable part of the principal activities for which Plaintiff was employed.

12. Defendant's requiring Plaintiff to complete the studies outside of working hours and refusing to pay overtime compensation for the studies was willful within the meaning of the Fair Labor Standards Act since Defendant knew or should have known that Plaintiff was en-

titled to compensation in the amount of one and one-half times his regular hourly rate.

13. The approximate sum due Plantiff for such overtime compensation is $30,000.00.

14. Defendant has failed to maintain records of those hours it required Plaintiff to work in excess of 40 hours a week.

15. Plaintiff has been required to retain the services of his undersigned attorney.

WHEREFORE, Plaintiff Henry T. Price demands overtime compensation for a period of three years preceding the filing of this complaint, liquidated damages, the award of a reasonable attorney's fee, costs, a trial by jury and all other relief provided by law.

COUNT II

16. Plaintiff realleges the facts set forth in Count I of this complaint and seeks injunctive relief as well.

17. Plaintiff has no adequate remedy at law for the continuing violations of the Fair Labor Standards Act.

18. Plaintiff will be irreparably injured if Defendant continues to violate the Wage and Hour provisions of the Fair Labor Standards Act.

19. Defendant has failed and refused to recognize its obligation under the Fair Labor Standards Act and has announced its intention to continue violating the Act.

WHEREFORE, Plaintiff Henry T. Price demands that this Court enter a permanent injunction prohibiting Defendant from compelling him to study the courses re-

quired by Defendant outside of working hours without receiving overtime compensation.

CONSENT OF EMPLOYEE TO BECOME PARTY PLAINTIFF

The undersigned Henry T. Price, an employee of Defendant Tampa Electric Company, hereby consents to become a party plaintiff in the above-captioned cause.

/s/ Henry T. Price

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

SWORN TO and SUBSCRIBED before me this 7th day of August, 1984.

/s/ Yolanda Macias
Notary Public
My commission expires:
NOTARY PUBLIC, State of Florida
My Commission Expires Aug. 22, 1987

Respectfully submitted,

/s/ Robert Fraser, ESQ.
Suite 1110
412 Madison Street
Tampa, Florida 33602
(813) 225-1591

AFFIDAVIT IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

STATE OF FLORIDA)
COUNTY OF HILLSBOROUGH)

Appeareth before me, the undersigned authority duly authorized by law to take oaths and acknowledgements, Henry T. Price, who being placed under oath deposes and says:

1. My name is Henry T. Price. I am the Plaintiff in *Price v. Tampa Electric Company.* All of the facts set forth in this affidavit are true, correct and made on personal knowledge.

2. I am seeking overtime compension for hours worked by me at home on my own time on three Heathkit courses taken at the insistence of Tampa Electric Company while I was employed by it as a Meter Mechanic "B."

3. I took the first Heathkit course while a contract between the company and Local 108 of the International Brotherhood of Electrical Workers was being negotiated. The pertinent portions of the agreement, which was executed on October 19, 1981 and made effective March 30, 1981, are attached to this affidavit and are incorporated by reference.

4. I elected to take the courses or face a demotion to Meterman under the Union contract. My duties as a Meterman before the contract was effective and those of a Meter Mechanic "B" were identical for all practical purposes. My failure to take the Heathkit courses would have constituted a demotion in fact since Metermen under the contract worked only on mechanical metering devices.

As a Meter Mechanic "B" I continued to work on mechanical and the more advanced solid state technology being used by Tampa Electric Company at the time.

5. I never agreed to do the course work on my own time. I took the courses only to avoid a demotion to Meterman under the Union contract when my duties were denominated as those of a Meter Mechanic "B." Only the title of my job changed, not its duties and responsibilities.

6. Tampa Electric Company has furnished other courses on company time before and after I took the Heathkit courses. Like the Heathkit courses, other training provided by the company was designed to make Meter Mechanics more proficient.

7. In the late 1960's or early 1970's, Tampa Electric Company began acquiring solid state electronic devices for metering purposes. The devices represented the state of the art and were far superior to the mechanical devices in use at the time and, to a large extent, still in use. The solid state equipment is still being incorporated in the system gradually.

8. The solid state equipment acquired by Tampa Electric Company before 1981 consisted of:

a. "JEM" meters to replace mechanical meters in commercial use.

b. Solid state recorders of data pulses to measure industrial customers' electrical use as well as the load requirements of residential customers for rate research.

c. Solid state totalizers to calculate kilowatt hours and electrical demand for commercial and industrial users.

9. I repaired and troubleshot all of the solid state equipment as well as I could before being required to take the Heathkit courses. The courses greatly improved my working knowledge of the functioning of the solid state equipment.

10. Repair cards reflecting my work on various pieces of solid state equipment are attached to this affidavit and are incorporated by reference. My name appears by my initials, H.T.P., on each card. They accurately reflect the work I performed on the solid state equipment as early as 1970. The attached copies reflect only a smattering of my work as all of the repair cards are not accessible to me.

11. As of 1981 I primarily worked in the rubber goods room testing gloves and other equipment. At times, however, I spent weeks working on solid state equipment. For example, in 1980 or 1981 I relieved Mr. Marcus Morris for four months while he attended a school. During this time I worked extensively on solid state equipment.

12. Even while working in the rubber room, I was always subject to call to work on solid state equipment as needed.

13. When the decision to have Metermen "volunteer" for the Heathkit courses was announced, I discussed it with the Union representative, Mr. James P. Rowland. I also discussed it with Mr. Reuben L. "Jack" Fleming, the company's director of labor relations, during

a meeting with the men of the Meter Department shortly before or after the contract was executed on October 19, 1981. At that time, I told Mr. Fleming that the courses should be given on company time and that the men should not be required to complete them on their own time.

14. When the decision to require the Heathkit courses was made, the company did not require any particular completion date. Later, time schedules for completion of the courses were imposed and employees who did not complete them were demoted to Metermen. The demoted men suffered a loss of salary. I realize that I would be demoted to Meterman and my pay would be reduced if I did not complete the courses. I completed them only under that condition. Copies of memoranda setting forth one demotion and the required completion dates are attached and incorporated by reference.

15. Under the circumstances, I was compelled to complete the AC electronics, electronics circuits and semiconductor devices courses on my own time in order to maintain my Meter Mechanic "B" status and salary.

16. After completing the courses, I continued to do the same work I was performing before I took the courses. The courses, however, enabled me to be much more proficient when my duties required me to repair or maintain solid state electronic devices, which I did frequently and still do.

FURTHER AFFIANT SAYETH NOT.

/s/ Henry T. Price

SWORN TO AND SUBSCRIBED to before me this 12th day of February, 1986.

/s/ Lorraine Giorgetti
Notary Public

My Commission Expires:

Notary Public, State of Florida at Large. My Commission Expires Aug. 28, 1989. Bonded thru Notary Public Underwriters.

METER DEPARTMENT

(1)(4)	S	Meter Mechanic "A"	12.09				
(3)(4)	S	Meter Mechanic "B"	11.40	11.58			
(5)	S	Meter Mechanic "C"	7.74 9.09	8.07 9.43	8.41 9.75	8.75 10.09
(2)	NS	Meterman	10.92	11.22			
(6)	NS	Meter Clerk	8.38 8.97	8.55 9.13	8.66 9.35	8.83

Meter Mechanic "A" or Mechanic "B" substituting for Foreman	90c per hour over Meter Mechanic "A" or Meter Mechanic "B" rate.

(1) To qualify, the employee must have demonstrated through formal and practical evaluation an understanding of and the ability to install, troubleshoot and maintain state-of-the-art electro-mechanical metering, digital electronic and analog electronic equipment to the component level. Formal evaluation shall include successful completion of Company approved advanced electronics courses.

(2) Classification to be deleted when it becomes vacant.

(3) To qualify, the employee must have satisfactorily completed a prescribed course of study and demonstrated through practical evaluation an understanding of and the ability to install, troubleshoot and maintain state-of-the-art electro-mechanical metering and digital and analog electronic equipment to the circuit board level.

(4) Te remain in this classification, the employee shall maintain competency by satisfactorily completing approved training programs.

(5) The employee may progress at an interval of less than six months where he demonstrates proficiency in the work covered by the revelant units of the prescribed course of study. To qualify to progress beyond the 4th step, employee must successfully demonstrate proficiency in the work covered by the first 8 units of the prescribed course of study.

(6) To qualify, employee must demonstrate a typing proficiency of forty (40) corrected words per minute, prior to being awarded the job.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

HENRY T. PRICE	:	
	:	
Plaintiff,	:	Civil Action No.
	:	
v.	:	84-1135-Civ-T-15
	:	
TAMPA ELECTRIC COMPANY	:	
	:	
Defendant.	:	

AFFIDAVIT OF JAMES PHILLIP ROWLAND

STATE OF FLORIDA)
)
COUNTY OF HILLSBOROUGH)

After being duly sworn, James Phillip Rowland states as follows:

1. My name is James Phillip Rowland and my business mailing address is Route 2, Box 309-A, Tampa, Florida 33610. I am the Business Agent for Local 108 of the International Brotherhood of Electrical Workers (IBEW). I have held this position since June 18, 1971.

2. I understand that this Affidavit may be used in the above-styled proceeding now pending in the United States District Court for the Middle District of Florida, Tampa Division, and I give this Affidavit freely with that understanding. I have personal knowledge of the facts set forth in this Affidavit.

3. Local 108 of the IBEW is the bargaining representative of various classifications of employees at Tampa Electric Company, including certain employees in the

Company's Meter Department. The terms and conditions of employment of these individuals in the Meter Department are set forth in the "Memorandum of Agreement" between the Company and the IBEW.

4. As the Business Manager of Local 108 of the IBEW, I participate in the negotiations with the Company regarding the terms and conditions set forth in the Memorandum of Agreement. I participated in the negotiations which resulted in the Memorandum of Agreement between the Company and the Union dated March 30, 1981 and ratified on October 19, 1981. During these negotiations, the Company and Union bargained about which group of employees would repair and maintain the solid-state meters which the Company might use in the future. The Company wanted to hire individuals directly from college who had the electronic skills to work on this new equipment while the Union wanted the "Metermen" from the Meter Department to have the opportunity to do this sophisticated work. However, the individuals who were classified as "Metermen" did not have the skills to repair and maintain the new solid-state meters but were qualified only to work on the old watt-hour (electro-mechanical) meters.

5. After numerous negotiations on this issue, the Company and Union agreed to retain the Meterman classification and to create additional classifications in the Meter Department, including the position Meter Mechanic "B." Individuals in the Meter Mechanic "B" position would be required to be able to repair and maintain the solid-state meters which the Company might use in the future.

6. On October 19, 1981, when the contract was ratified, each meterman had the option to move to the Meter

Mechanic "B" position with a higher rate of pay if he would agree to sign up for and complete four (4) Heathkit courses. The purpose of these Heathkit courses was to teach the individuals the new and sophisticated skills necessary to learn to work on solid-state meters. The Metermen who decided *not* to sign up for and take the Heathkit courses were allowed to retain their meterman position and continue to do the work which they had always done. The metermen who elected to sign up for and take the Heathkit courses were immediately moved into the higher paying Meter Mechanic "B" position in accord with the immediate pay increases which the Union negotiated.

7. I personally conveyed these options to the metermen, including Henry T. Price, during a meeting with them. Henry T. Price elected to take the Heathkit courses in order to obtain the higher paying position of Meter Mechanic "B".

8. In late 1982, Henry T. Price informed me that he felt the Company should provide the Heathkit training courses during Company time. I requested that the Union's attorneys give me an opinion on this issue and they determined that the Fair Labor Standards Act did not require the Company to pay Plaintiff or other Meter Mechanic "B" 's for their study time.

8. The foregoing information is true and correct to the best of my knowledge and belief.

/s/ James Phillip Rowland

Sworn to and subscribed to
before me this 14th day of
January, 1986.

/s/ Kelly L. Sloan
Notary Public
My Commission Expires:

MEMORANDUM

TO: Gary Pennington April 11, 1983

FROM. J. B. Martin

SUBJECT: SKILLS UPDATE TRAINING

Your progress in completing the first course (DC Electronics) in the Heathkit series of four electrical/electronic courses has not been satisfactory. You will be allowed until May 2, 1983, to successfully complete the course and pass the final exam.

If you have not passed the final exam by May 2, 1983, you will be reclassified to 'Meterman'.

For your information, a schedule for completing all four courses is attached.

/s/ J. Burnham Martin
Manager, Meter Operations

Attachment
cc: R. L. Fleming

MEMORANDUM

TO: ALL CONCERNED April 11, 1983

FROM: T. M. Badger

SUBJECT: HEATHKIT CONTINUING EDUCATION TRAINING COURSES

Listed below is the schedude for completion of the Heathkit Training Courses required to maintain the Meter Mechanic 'A' or Meter Mechanic 'B' classification:

COURSE NAME	UNITS	REQUIRED COMPLETION DATE
DC Electronics	8	May 2, 1983
*AC Electronics	6	Aug. 8, 1983
Semiconductor Devices	10	Oct. 31, 1983
*Electronic Circuits	7	Mar. 5, 1984

*Final examination includes a practical evaluation.

/s/ T. M. Badger
Principal Engineer

cc: Mr. J. B. Martin
Mr. R. B. King
Mr. L. A. Lane
Mr. W. D. Robbins

Supreme Court, U.S.
FILED
MAY 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1589

In The
Supreme Court of the United States
October Term, 1986

HENRY T. PRICE,
Petitioner,

v.

TAMPA ELECTRIC COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

CHARLES K. HOWARD, JR.*
STANFORD G. WILSON
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QUESTION PRESENTED

The lower courts decided this case by the application of clear statutory mandate and administrative regulations to undisputed facts. The Petition attempts to recharacterize these facts in such a manner to allow Petitioner to recover. He points to no significant legal issues or conflict among the Circuit Courts.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
Cases	iii
Federal Statutes	iii
Federal Rules of Civil Procedure	iii
Department of Labor Regulations	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES

Berenyi v. Director, Immigration and Naturalization Service, 385 U.S. 630 (1967) 4

Britt v. Trailmobile Co., 179 F.2d 569 (6th Cir. 1950), *cert. denied*, 340 U.S. 820 (1951) 5

Marshall v. Baptist Hospital, 668 F.2d 234 (6th Cir. 1981) 3

Merrill v. Exxon Corp., 387 F.Supp. 458 (S.D. Tex. 1974) 4

Perma Research and Development Co., 410 F.2d 572 (4th Cir. 1969) 7

Udall v. Tallman, 380 U.S. 1 (1965) 4

FEDERAL STATUTES

Fair Labor Standards Act,
Section 16(b), Fair Labor Standards Act,
29 U.S.C. § 216(b) 2

Section 10, Portal-to-Portal Act,
29 U.S.C. § 259 3

FEDERAL RULES OF CIVIL PROCEDURE

Fed. R. Civ. P. 56 8

DEPARTMENT OF LABOR REGULATIONS

29 C.F.R. § 785.27 ..... 2, 3

29 C.F.R. § 785.29 ..... 4, 6

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The Order of the United States District Court for the Middle District of Florida is unreported, and is reproduced at pp. A5-A9 of the Petition.

The Decision of the United States Court of Appeals for the Eleventh Circuit is reported at 806 F.2d 1551 (11th Cir. 1987), and is reproduced at pp. A1-A4 of the Petition.

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JURISDICTION

This Court has jurisdiction to review the decision of the Court of Appeals on petition for certiorari under 28 U.S.C. § 1254(1).

———o———

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The applicable provisions of law are set forth in the Petition at pp. 1-4.

———o———

STATEMENT OF THE CASE

Petitioner Henry T. Price filed this action against his employer, Tampa Electric Company,[1] in the United

[1] Tampa Electric Company is a public utility primarily engaged in generating and distributing electrical power to residential and commercial users.

States District Court for the Middle District of Florida. He sought recovery under § 16(b) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b) ("FLSA"), for unpaid overtime compensation, liquidated damages, attorney's fees and costs.[2] Specifically, he demanded thirty thousand dollars ($30,000) in overtime compensation for time allegedly spent taking home study courses.

At the close of discovery, Tampa Electric Company moved for summary judgement on the grounds, *inter alia*, that the courses were voluntarily taken in an attempt to obtain a higher paying position, therefore, the study time did not constitute working hours under 29 C.F.R. § 785.27. The motion cited Petitioner's deposition testimony establishing these facts. Petitioner's response to the summary judgement motion included an affidavit wherein he contradicted his deposition testimony regarding the reasons for taking the courses.

On March 13, 1986, the District Court granted the summary judgement motion and dismissed the Complaint. The Court noted that: "Not only are the material facts not in dispute but the plaintiff's case is internally defective to a degree that makes questionable his good faith." On January 5, 1987, the United States Court of Appeals

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[2] Petitioner had previously unsuccessfully sought redress in the form of a grievance under the collective bargaining agreement, which the union refused to pursue on his behalf (Petition, p. A25), and in a charge filed with the U.S. Department of Labor, which was denied (Petition, p. 6).

for the Eleventh Circuit affirmed the District Court's Order granting summary judgement.[3]

———o———

REASONS FOR DENYING THE WRIT

The decision below turns upon the particular facts of this case and affirms well-established law with regard to overtime compensation for home-study courses.

Under the regulations issued by the Department of Labor pertaining to "hours worked" under the FLSA, time spent in training programs need not be counted as working time if: (1) attendance is voluntary; (2) the course is not directly related to the employee's job; (3) attendance is outside of the regular working hours; and (4) the employee does not perform productive work during attendance. 29 C.F.R. § 785.27. "Where a training course is instituted for the *bona fide* purpose of preparing for advancement through upgrading the employee to a higher skill, and is not intended to make the employee more efficient in his present job, the training is not considered directly related to the employee's job even though the course incidentally improves his skill in doing his

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[3] Since the Complaint was dismissed on other grounds, neither the District Court nor the Court of Appeals found it necessary to pass on Tampa Electric Company's defense that the claim should be barred since the alleged violation "was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation" of the Department of Labor. Section 10 of the Portal-to-Portal Act, 29 U.S.C. § 259. *See also Marshall v. Baptist Hospital*, 668 F.2d 234, 239 (6th Cir. 1981).

regular work." 29 C.F.R. § 785.29. Since the Department of Labor is authorized to interpret and administer the Wage and Hour Laws, its regulations are entitled to great weight. *Udall v. Tallman,* 380 U.S. 1 (1965); *Merrill v. Exxon Corp.,* 387 F.Supp. 458 (S.D. Tex. 1974).

The Petitioner does not dispute the applicability or correctness of the DOL's regulations; he merely attempts to distort the facts of his case, as found by the Courts below, to allow him to recover under these provisions. This Court has repeatedly stated that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *See, e.g., Berenyi v. Director, Immigration and Naturalization Service,* 385 U.S. 630, 635 (1967).

The record in this case clearly reveals that the home-study courses taken by Petitioner were for the "bona fide purpose of preparing for advancement through upgrading the employee to a higher skill," therefore, his study time is not compensable.

The Petition correctly asserts that in 1981: Petitioner had been a Meterman in Respondent's meter department for 34 years; that advancing technology had begun to gradually bring about a change from traditional electro-mechanical metering devices to new state-of-the-art solid state equipment; that Respondent and Petitioner's Union negotiated a new collective bargaining agreement dividing the then existing Meterman classification into categories including Meter Mechanic "A", Meter Mechanic "B", and Meterman; that under the new agreement, Metermen were to be assigned to work on the

electro-mechanical equipment while the Meter Mechanics would be assigned to work on the new solid state meters; and that the existing Metermen were allowed the option of remaining in Meterman classification at the same rate of pay, or electing to move to the higher-paying Meter Mechanic "B" category immediately, upon the condition that they complete a home-study course in solid state technology. (Petition, pp. 4-5).

Petitioner errs, however, when he states that his "home study courses were related to his work and were completed by him involuntarily as his failure to do so outside working hours would have resulted in a demotion to the Meterman classification created by the agreement." (Petition, p. 6). The "demotion" of which Petitioner speaks would have been merely a return to his original Meterman position for failure to meet the conditions of the promotion. Thus, as noted by the District Court, "[s]uch is not a 'demotion' and cannot be used as a basis for arguing that plaintiff's choice to pursue the coursework and receive the higher class B pay was involuntary. To conclude otherwise in the context of this case would be to penalize an employer for offering employees an incentive for self-improvement." (Petition, p. A7).

Mr. James P. Rowland, Business Agent for Petitioner's union,[4] explained the conditional promotion as follows:

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[4] Petitioner was a member of the unit of employees represented by the union as well as a union member (see Petition, p. 6); therefore, the negotiated job classifications and promotional prerequisites were binding on him. *See, e.g., Britt v. Trailmobile Co.*, 179 F.2d 569, 572 (6th Cir. 1950), *cert. denied*, 340 U.S. 820 (1951).

> [E]ach Meterman had the option to move to the Meter Mechanic "B" position with a higher rate of pay if he would agree to sign up for and complete four (4) Heathkit courses. The purpose of these Heathkit courses was to teach the individuals the new and sophisticated skills necessary to learn to work on solid-state meters. The Metermen who decided *not* to sign up for and take the Heathkit courses were allowed to retain their Meterman position and continue to do the work which they had always done. The Metermen who elected to sign up for and take the Heathkit courses were immediately moved into the higher paying Meter Mechanic "B" position in accord with the immediate pay increases which the Union negotiated.
>
> I personally conveyed these options to the Metermen, including Henry T. Price, during a meeting with them. Henry T. Price elected to take the Heathkit courses in order to obtain the higher paying position of Meter Mechanic "B".

(Petition, pp. A24-A25). Had the company and the union not agreed to a conditional promotion, but instead required the Metermen to complete the courses *prior* to being elevated to Meter Mechanic, there would be no question that the courses were being taken "for advancement through upgrading the employee to a higher skill" (29 C.F.R. § 785.29). The Courts below properly found that the conditional promotion did not alter the purpose of the courses.

Petitioner also argues that summary judgement was inappropriate since there were "sharply disputed facts" as to his job duties before and after the 1981 collective bargaining agreement. This alleged dispute was raised in his

affidavit[5] opposing summary judgement and contradicts his deposition testimony that 90% of his time was spent testing rubber goods, and the remaining 10% was spent working on the metering equipment that the company had been using for several years. (*See* Petition, p. A3).

To the extent that this affidavit contradicts Petitioner's deposition testimony, it was properly disregarded. *See, e.g., Perma Research and Development Co.*, 410 F.2d 572, 578 (4th Cir. 1969) ("If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgement as a procedure for screening out sham issues of fact."). Moreover, the Court below held that the affidavit was patently unbelievable:

> Appellant contends that he was already familiar with the operation of solid-state meters as a result of his work on advanced components of the traditional meters, but this claim seems inconsistent with his assertion that he spent more than 2,000 hours studying the courses at home. Yet, assuming that appellant already possessed all of the skills necessary to work on the new solid-state meters, he would not be entitled to overtime compensation for his study time. The appropriate relief would have been to seek a waiver of the course requirement, prior to enrollment and completion of the four courses.

(Petition, p. A4).

The affidavit is also insufficient to raise a factual issue in view of record evidence that the courses were

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[5] The affidavit claimed that Petitioner had worked on solid state equipment prior to 1981. (Petition, pp. A19, A20).

for the purpose of preparing employees to repair and maintain "the solid state meters which the company might use *in the future*" (Petition, p. A24) (emphasis added), thus Petitioner's alleged work on the limited amount of solid state equipment the company used at the time is immaterial.

The Court therefore did not err in affirming summary judgement since there was no "genuine issue as to any material fact." *Fed. R. Civ. P.*, 56.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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